

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

NUMBER _____

RICHARD A. SHERLOCK

Petitioner

VS.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

THE DECISIONS BELOW ARE IN CONFLICT WITH THE FIFTH CIRCUIT'S OWN RULES AND PRIOR OPINIONS.

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II.

THE DECISIONS BELOW ARE AT VARIANCE WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS; CONSTITUTE A DENIAL OF DUE PROCESS AND EQUAL PROTECTION; AND ARE INCONSISTENT WITH THE PRIOR RULINGS OF THIS SUPREME COURT.

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5 th Cir. R. 42.3.1.2 -	PASSIM
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OPINIONS AND ORDERS ISSUED IN THIS CASE

The case and opinion below is unreported. The Opinions and Orders issued in this case number three. The first is a clerical dismissal of the appeal to the fifth Circuit Court of Appeals on 9 November 05. The second is an Order issued by the Panel below and is dated 6 January 05. The third is an Order denying Motion for Rehearing of the prior opinion and is dated 10 March 05. While these Order are appropriately discussed below, an exact reproduction of the opinion and/or order in full is included in the Appendix at the end of the Petition for Certiorari.

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard A. Sherlock respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a clerical grant of a procedural dismissal of Petitioner's Appeal from the District Court as to Orders supporting the District Court's Order for Sale of Petitioner's residential real property.

OPINIONS BELOW

Petitioner Richard A. Sherlock seeks this court's review of orders denying his objections to a procedural dismissal of his appeal before the Fifth Circuit.

The Fifth Circuit Court of Appeals has issued two Orders denying both of Petitioner's Motions: 1) Motion for Rehearing, Fifth Circuit Order denying relief, dated 6 January 05, together with Petitioner's subsequent 2) Motion for Reconsideration, Fifth Circuit Order denying relief, dated 10 March 05. Previously, the clerk's procedural dismissal without notice to Petitioner in express contravention Local

Rules of the Fifth Circuit in this case was entered on 9 November 04. This case before the Fifth Circuit Court of Appeals is unreported.

JURISDICTION

The Fifth Circuit entered its last Order in this case on 10 March 05. This post Judgment/Opinion Petition for Certiorari is timely filed and this Supreme Court has jurisdiction under 28 U.S.C. Section 1254(1), et seq.

Pursuant to Supreme Court Rule 14(1)(e)(v), notification has been made and is duly noted on a separate Certificate of Service tendered to the Clerk contemporaneous with the filing of the Petition for Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves that portion of Section 1 of the fourteenth article of amendments to the Constitution for the United States of America respecting due process and equal protection of the laws of the United States.

Article 14, Section 1 of the Amendments to the Constitution for the United States of America states in pertinent part as follows:

“...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

FIFTH CIRCUIT RULES INVOLVED

The particular Rule of the Fifth Circuit Court of Appeals involved in this *pro se* case is set out in pertinent part as follows:

5th Cir. R. 42.3.1.2 states in pertinent part as follows:

"42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari filed by Richard A. Sherlock (Sherlock) is made necessary due to a denial of Sherlock, proceeding pro se, to have his case reviewed by the Fifth Circuit on its merits as distinguished from the procedural dismissal pursuant to the Clerk's Letter Order by which this case was disposed. App. A. This procedural dismissal was carried out by the Clerk of the Fifth Circuit without the requisite letter notice of intent to dismiss as is expressly set out in the Fifth Circuit Rules. Sherlock never received the type of notice as expressly required by the rule. Contrary to the rule, Sherlock did receive a notice which failed to comply with the notice requirements of the rule. Accordingly, Sherlock was denied the required due process and equal protection of receiving the required notice of an intent to dismiss the appeal. Absent the required notice as set out in the rule, the Clerk did not have jurisdiction or discretion to dismiss pursuant to the rule. Dismissal deprived Sherlock of his right to have his appeal reviewed by the Fifth Circuit Panel on its merits. Subsequently, Orders issued denying Sherlock's Motion to Reinstate and for Rehearing. App. B and C.

1. Appeal to Fifth Circuit Was Filed and Docketed Timely

The appellate case below was timely and properly appealed from the United States District Court for the Eastern District of Louisiana at New Orleans, Louisiana, in cause number 94-1867-K5. Subsequently, this case was docketed by the Clerk of the Fifth Circuit Court of Appeals (Fifth Circuit) and assigned the number 04-30163. Both cases are unreported. See Docket Sheet, App. D.

2. Letter from Clerk's Office Giving Notice of Deficiency Failed to Give Notice of an Intent to Dismiss.

After receiving a letter notice of a deficiency as to Record Excerpts via Fifth Circuit Clerk's letter dated 13 October 04, (App. I) the deficiency noticed in the letter was cured. Sherlock's curative Record Excerpts were tendered to the clerk for filing on the morning of 9 November 04.

The Clerk's letter to Sherlock dated 13 October 05, failed to give proper notice of an intent to dismiss contrary to the express requirements of the underlying 5th Cir. Rule 42.3.1.2, *infra*, respecting any intent to dismiss the case absent the curative Record Excerpts being filed. App. I

However, Sherlock's filing of Record Excerpts was subsequently made on 9 November 04 without any knowledge at that time by Sherlock of the then - apparently - Clerk's intended letter Order of Dismissal mailed to Sherlock later on the same day - - 9 November 04. Significantly, in light of the later actual dismissal by the clerk, the Clerk's letter notice to Sherlock as to the Record Excerpts deficiency needing to be cured, dated 13 October 04, failed utterly to contain the required notice of any intent to dismiss if the noticed deficiency was not cured. App. I, App. D.

Since the clerk failed to give the expressly required notice as is made requisite under the 5th Circuit Rules, the Clerk lacked jurisdiction and discretion to dismiss the Appeal pursuant to any post notice authority arising under the rule.

3. Clerk Noticed Sherlock as to Dismissal of the Appeal

On or about 13 November 04, Sherlock received notice from the clerk, dated 9 November 04, (See: App. A.) allegedly acting pursuant to Fifth Circuit Rule 42.3.1.2 that this case "... is dismissed...". Particular note is made that the dismissal was dated 9 November 04, and was predicated on an alleged "...want of prosecution...". Dismissal was expressly stated to be due to Sherlock having failed to timely file Record Excerpts. Apparently, the dismissal pursuant to Rule 42.3.1.2, for alleged failure to file Record Excerpts, was executed, entered of record and mailed the same day, 9 November 04, despite the same Record Excerpts having been filed with the Clerk the morning of that same day.

4. Sherlock Filed His Motion to Reinstate Appeal

Subsequently, Sherlock filed his Motion to Reinstate Appeal, (App. E) made necessary due to the Rule 42.3.1.2 Clerk's initiated dismissal of 9 November 2004, "...for want of prosecution ..." alleged to be because of Sherlock's failure to file Record Excerpts which were in fact then already filed of record on the morning of 9 November 04. See: Docket Sheet - App. D.

5. Motion to Enlarge Time to File Record Excerpts Were Filed Contemporaneously with Motion to Reinstate Appeal

Coincident with the filing of his Motion to Reinstate Appeal, and in an abundance of caution, Sherlock filed his Motion to Enlarge time to File Record Excerpts. (App. G) However, the tender of the Motion was noticed by letter dated 16 November 04, to Sherlock by the Clerk as to the Motion being "...not filed...". See Clerk's Letter at App. H

6. Motion to Reinstate Appeal Filed and entered on Docket

Diligently, three days after being notice of the dismissal of his appeal, on 16 November 05, Sherlock filed his Motion to Reinstate Appeal and the same was docketed by the Clerk. App. E

7. Clerk Noted Filing of Record Excerpts but failed to Docket that Filing

On 16 November 05, the Clerk entered on the docket Sherlock's filing of his Motion to Reinstate Appeal and noted within that docket entry as follows: "...Default Remedied? (Y/N): Y (Record Excerpts received 11/9/04)...". However, the docket fails to otherwise reflect any docketing of Sherlock's actual filing of the Record Excerpts on 9 November 04 or any other date. See: Docket Sheet App. D

8. Fifth Circuit Panel Issues Order Denying Motion to Reinstate

Absent any response from opposing counsel, on 6 January 05, the Fifth Circuit Panel by Order denied Sherlock's Motion to Reinstate the appeal. See: Appendix ---

9. Motion for Rehearing of the Order Denying Motion to Reinstate filed.

On 22 February 05, Sherlock filed his Motion for Rehearing (docketed as Motion for Reconsideration) as to the Denial of Sherlock's previously filed Motion to Reinstate Appeal. See App. F

10. Fifth Circuit Panel Issues Order Denying Motion for Rehearing

Absent any response from Opposing Counsel, on 10 March 05, the Fifth Circuit Panel Ordered Sherlock's Motion for Reconsideration Denied and this Petition for Certiorari timely follows. App C

Pursuant to 28 U.S.C. Section 1254(1), et seq., Richard A. Sherlock respectfully seeks review by this Honorable Court.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

I.

**THE DECISIONS BELOW ARE IN CONFLICT WITH
THE FIFTH CIRCUIT'S OWN RULES AND PRIOR
OPINIONS.**

In cases where, as in the instant case, the Appellant is proceeding pro se, "*without counsel*", in the Fifth Circuit, and where the Clerk seeks to notice Appellant as to a deficiency in prosecuting a case, the 5th Circuit Rule 42.3.1.2 requires that "...[t]he clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution...". No such notice - ie: giving notice of an intent to dismiss the appeal - was ever received by Sherlock in this case.

5th Circuit Rule 42.3.1.2 goes on to state that "*...If the default is remedied within that time, the clerk must not dismiss the appeal.*" Sherlock notes that under these circumstances, "*... that time...*" as qualified in the rule never starts to run because the required notice required under the rule was never given in the first instance. Accordingly, the Clerk, absent any notice properly given pursuant to the rule, lacked the jurisdiction and discretion to proceed to dismiss on

the authority of the same Rule 42.3.1.2 with which the clerk had previously failed to comply.

Sherlock did receive a letter notice from the Clerk dated, 13 October 04, giving notice of a deficiency as to record excerpts. (App. I) No mention of an intent to dismiss was contained in the letter or was ever given at any later time. Subsequently, Sherlock cured the noticed deficiency by filing the record excerpts intending to cure the deficiency notice by the Clerk's letter of 13 October 04.

Under these circumstances the Clerk, while failing to follow the appropriate 5th Circuit Rule, seeks to harshly and fatally impose that same rule on Sherlock to effect a dismissal of the appeal and deny to Sherlock his right to have his appeal adjudicated on the merits before a panel of the Fifth Circuit.

Further, the Fifth Circuit Panel's Order overruling Sherlock's Motion to Reinstate in this case, Order dated 6 January 05, (App. B) is apparently inconsistent with the settled principles of the Fifth Circuit against a harshly imposed policy of dismissal in favor of a preferably liberal approach as set out in that Court's prior rulings.

For example, in Jureczki v. City of Seabrook, 668 F.2d 851 (5th Cir. 02/26/1982), the fifth circuit, relying on Conley v. Gibson, 1957, 355 U.S. 41, at 45-46, 78 S. Ct. 99, at 102, 2 L. Ed. 2d 80, stated that:

"In denying the plaintiff's request for reconsideration, the district court stated that it had dismissed the action "on the merits" ...
"...its [the district court's] action is contrary to the well-established policy of the federal rules that the plaintiff be given every opportunity to state a claim. We echo our earlier position on the question of dismissal with prejudice: "In the decided cases it is recognized that the dismissal of a case with prejudice is a drastic remedy to be used only

in those cases where a lesser sanction would not better serve the interests of justice." Brown v. Thompson, 5 Cir. 1970, 430 F.2d 1214, 1216."

There can be no doubt that a procedural dismissal by a Clerk is a harsh remedy – even in the face of a strictly adhered to procedure which faithfully and dutifully includes the required notice of intent to dismiss.

However, in this case no notice of an intent to dismiss was given – the rule was itself not followed by the Clerk who later dismissed Sherlock's appeal based upon that very rule. It would seem wildly inconsistent for the Fifth Circuit to on the one hand speak as to a litigant being "...given every opportunity..." to cure the defect noticed while on the other hand harshly dismissing this case when the underlying and empowering rule was itself not complied with as to the requisite strict notice requirements expressly set out in the 5th Circuit Rule 42.3.1.2.

Ostensibly the very purpose of the rule is to place the litigant on actual notice as to the consequences of dismissal in the event the defects noticed are not timely cured. But, as set out clearly above, what's missing here in this case is any notice as to intended dismissal itself absent which the Clerk having thusly failed to comply with the rule was not thereafter justly and properly authorized to employ that rule to effect a dismissal as was so harshly impose upon Sherlock and his appeal in this case.

The great division in these two rulings of the Fifth Circuit, the Brown ruling noted above and this instant case, palpably leaves a broad gulf of inconsistency which compels a just and corrective action by this Court. The Fifth Circuit Panel's 6 January 05 ruling denying Sherlock's Motion to Reinstate must be reversed.